

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

It is undisputed that claimant had multi-level degenerative disk disease identified by an MRI performed in 2006. And on January 12, 2007, Dr. Matthew Henry performed surgery on claimant consisting of a fusion at L5-S1. After the surgery claimant complained of some ongoing leg pain and another MRI was performed in November 2007 which was interpreted as consistent with the 2006 MRI with the additional post surgical changes at the L5-S1 level. Claimant was referred for a neurological consult but canceled the appointment when his personal health insurance was canceled. In the summer of 2010, claimant sought emergency room treatment after straining his back lifting while moving.

Claimant started working in September 2010 for respondent through a temporary agency. He was then hired by respondent in December 2010. Claimant testified that his job duties required him to physically twist, lift and bend over constantly. Claimant testified he did not have any back problems nor restrictions while working for respondent from September 2010 through March 2011.

Claimant injured his back on March 10, 2011, while working for respondent. He described the injury as follows:

We were moving some angle iron, we brought it inside, me and another gentleman, placed it on the floor. I bent down to lift it up, and when I went to raise up, my back locked, locked up on me, took me to my knees, I couldn't move, couldn't stand back up fully and then I went to our HR director and told her what was going on. This was right after work started, so they took me to the Emergency Room because the work comp facility wasn't open at the time.¹

Claimant was provided treatment including a series of epidural injections which failed to provide any relief. Dr. John Babb referred claimant to Dr. Henry for a surgical consult. Dr. Henry noted that claimant's back pain was in a different location than it was with his injury that had required surgery at L5-S1. Dr. Henry opined claimant had suffered a new second injury. On July 28, 2011, Dr. Henry performed surgery on claimant's low back consisting of microdiscectomies at L1-2, L2-3 and a medical facetectomy and foraminotomy at L3-4.

Dr. Henry ordered physical therapy for an additional six weeks and claimant's last physical therapy appointment was November 12, 2011. Dr. Henry placed restrictions on claimant of no frequent or repetitive lifting greater than 25 pounds as well as occasional lifting, pushing, and pulling of 25 pounds maximum.

Claimant was terminated by respondent in May 2011 due to violation of its drug policy. Claimant explained that he was unaware that his doctor had increased the potency of his prescription drugs and that lead to his successive positive drug screen.

¹ P.H. Trans. at 7-8.

Dr. Babb, in an August 22, 2011 letter to respondent's counsel, opined that claimant had preexisting lumbar degenerative disk disease at L2-3 and that his current low back pain and need for treatment was the direct and natural consequence of the preexisting degenerative disk disease which could have been worsened by claimant's previous lumbar fusion.

As previously noted, Dr. Henry concluded claimant's March 10, 2011, accidental injury was a new second accident and Dr. Henry further opined claimant's surgery and present medical condition were directly related to an aggravation of his preexisting degenerative disk condition.

An accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.² The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.³

In the recent *Bryant*⁴ decision, the Kansas Supreme Court noted that in the determination of whether an injury arises out of employment the focus of inquiry is whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The analysis is not on an isolated movement such as bending, twisting, lifting, walking or other body motions but instead focuses on the overall context of what the worker was doing performing the work-related activities.

The claimant bent over at work while working with angle iron. He suffered a sudden onset of pain that prevented him from straightening up. Although claimant had preexisting degenerative disk disease he was able to perform his job duties for respondent without restrictions or difficulty from September through March. After the incident at work on March 10, 2011, claimant experienced pain which Dr. Henry noted was different than his prior complaints. The ALJ concluded claimant's testimony and Dr. Henry's opinion were persuasive that claimant suffered accidental injury arising out of and in the course of his employment on March 10, 2011, and his current need for treatment is causally related to that incident. This Board Member agrees and affirms.

² *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255, (2011); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁴ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255, (2011).

Respondent next argues the ALJ erred in awarding claimant temporary total disability compensation. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁵

A contention that the ALJ erred in finding the evidence established claimant is entitled to temporary total disability compensation is not an argument the Board has jurisdiction to consider. Whether the ALJ should, in a given set of circumstances, authorize temporary total disability compensation is not a question that goes to the jurisdiction of the ALJ. K.S.A. 44-534a, as amended, specifically grants an ALJ the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation. Therefore, the ALJ did not exceed her jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 12, 2011, is affirmed.

IT IS SO ORDERED.

⁵ See K.S.A. 44-551.

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2010 Supp. 44-555c(k).

Dated this _____ day of December, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Kenton D. Wirth, Attorney for Claimant
 Terry J. Torline, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge